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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.622(b),
Table of Allotments,
Digital Television Broadcast Stations
(Fort Myers, Florida)

DOCKET FILE COPY ORIGINAL

MM Docket No. 00-180
RM-9956

To: Chief. Video Division
Media Bureau

PETITION FOR RECONSIDERATION OF COX BROADCASTING, INC.

Cox Broadcasting, Inc. ("Cox"), parent company of the licensee of WFTV(TV) (Orlando, Florida), by its attorneys and pursuant to Section 1.429 of the Commission's rules,¹ hereby petitions for reconsideration of the Commission's Report and Order ("**Order**") in the above-referenced proceeding.² In the *Order*, the Commission granted the request of Fort Myers Broadcasting Company ("FMBC") to substitute Channel 9 as the DTV allotment for its licensed station WINK-TV (Fort Myers, Florida). Because of the likelihood that viewers of station WFTV(TV) will receive interference in excess of that predicted, and for the particular deficiencies of the **Order** described herein, Cox respectfully seeks reconsideration of the decision.

Noted for record of 4

¹ 47 C.F.R. § 1.429 (2001).

² Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Fort Myers, Florida), *Report and Order*, MM Docket No. 00-180, DA 02-3154 (rel. Nov. 20, 2002). Public notice of the **Order** was given on November 21, 2002. Accordingly, this petition for reconsideration is timely filed. *See* 67 FR 70179 (Nov. 21, 2002); 47 C.F.R. §§ 1.429(d), 1.4(b).

I. THE COMMISSION FAILED TO CONSIDER COX’S REQUEST THAT THE WINK-DT AUTHORIZATION BE CONDITIONED UPON A SHOWING THAT ACTUAL INTERFERENCE COMPORTS WITH *DE MINIMS* PREDICTIONS.

In the comments it filed in this proceeding, Cox described its concern about the likelihood that actual interference to WFTV(TV) as caused by the proposed WINK-DT channel change would exceed the levels predicted. Although the Commission found the proposal compliant with its current standards, there is no question, for example, that the Channel 9 operations would fail the interference requirements for new DTV allotments.’ Moreover, because WFTV(TV) already receives a significant amount of interference from *analog* stations, Cox explained in its comments that it was especially concerned about the superior signal propagation in southern Florida and the likelihood that WINK-DT would exacerbate WFTV(TV)’s interference problems. These concerns subsequently have been validated by the experiences, for example, of WBOC-TV (Salisbury, Maryland) and KSPX(TV) (Sacramento, California), stations now plagued by harmful interference from new DTV stations at levels far in excess of that predicted.⁴ Accordingly, Cox had urged the Commission to require WINK-DT to take corrective steps if actual interference to WFTV(TV) exceeded *de minimis* levels.⁵

The *Order* makes no reference to Cox’s request, and there is no evidence that the Commission considered it. Such an omission would be indicative of arbitrary and capricious rulemaking, as the Commission is charged to make a “consideration of the relevant factors” and

³ WINK-DT would be 62.8 km short-spaced to WFTV(TV) pursuant to Section 73.623(d).

⁴ See Bill McConnell, *DTV Picture Clouds Over*, BROADCASTING & CABLE, July 15, 2002, at 52 (“As more digital stations come on-air, . . . broadcasters are finding that the actual coverage area and signal strength of DTV stations are sometimes quite different from the theoretical”).

⁵ Cox Comments at 3.

base its decisions accordingly.⁶ Hence, Cox respectfully requests that the Commission reconsider its unconditional grant of the WINK-DT channel change and state with particularity the actions it would take if actual interference from WINK-DT's operations on Channel 9 exceeds the *de minimis* levels predicted. Cox recommends that such corrective action would include, at a minimum, a requirement that WINK-DT reduce power to a level such that actual interference is commensurate with that predicted. Attaching such a condition would be more than reasonable given the potential impact on WFTV(TV)'s existing viewers. Indeed, should the interference predictions prove accurate and levels genuinely are *de minimis*, the condition obviously would have no consequence. Accordingly, the Commission should reconsider the WINK-DT channel change and account for all relevant factors raised in the proceeding.

II. DISREGARDING AS SPECULATIVE COX'S CONCERNS ABOUT POST-TRANSITION OPERATION IS ERRONEOUS.

Cox also explained in its comments in this proceeding that operation of WINK-DT on Channel 9 would have a preclusive effect on WFTV(TV)'s ability to serve existing viewers after the DTV transition period ends. Station WFTV expects to begin broadcasting in digital on its traditional Channel 9 at a time no later than the close of the DTV transition. If WINK-DT also elects Channel 9 as its permanent channel, WFTV-DT would cause interference to 4.43% of WINK-DT's existing service area population. Because this aspect would deprive WFTV of the full use of its traditional channel and preclude maximization, Cox requested that the WINK-DT authorization be conditioned on the surrender of Channel 9 at the close of the DTV transition.⁷ In response, FMBC stated its expectation that, "absent some unforeseen event," it ultimately

⁶ *Damsky v. FCC*, 199 F.3d 527, 533 (D.C. Cir. 2000) (*citations omitted*); *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983).

⁷ Cox Comments at 3.

would operate WINK-DT on Channel 11 and surrender Channel 9.⁸ Cox acknowledges this qualified expression of intent.

The Commission, however, rejected Cox's request, calling the concern about future use "speculative" and thus not requiring consideration." The Commission's response, however, is unreasonable and inconsistent with Commission precedent. Cox either will select Channel 9 or the allotted DTV channel for permanent, post-transition operation. Of these two channels, digital operation on the desired Channel 9 will be impacted if FMBC also selects Channel 9 for permanent, post-transition operation – again, one of only two channels available for selection. Given this small and finite number of outcomes, the Commission cannot merely dismiss Cox's concerns as "speculative" when co-channel operation of WFTV and WINK is foreseeable and the predicted interference of such is certain." Accordingly, Cox requests that the Commission reconsider this aspect of its decision and condition authorization of the WINK-DT channel change on the post-transition surrender of Channel 9.

⁸ FMBC Reply Comments at 4.

⁹ *Order*, ¶ 5

¹⁰ The Commission distinguished "reasonable predictions" from "speculative labors" in *Better Cable TV, Memorandum Opinion and Order*, 45 RR 2d 1581, ¶ 4 (1979), citing *Texas Community Antennas, Inc., Memorandum Opinion and Order and Order To Show Cause*, 68 FCC 2d 1271.7 20 (1978). See also *Assignment of the Licenses of WJWF(AM) and WMBC(FM), Memorandum Opinion and Order*, 17 FCC Rcd 5373, ¶ 40 (2002) (matters that are "real and substantial" are not speculative); *WMJX, Inc.*, 85 FCC 2d 251, ¶ 25 (1981) (ALJ's conclusions not speculative where amply supported by specific findings based upon the evidence).

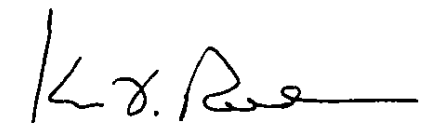
CONCLUSION

THEREFORE, given the likelihood that the operation of WINK-DT on Channel 9 will result in excessive interference to viewers of WFTV(TV), as well as the operation's preclusive effect on WFTV's broadcasting capabilities after the DTV transition, **Cox** requests that the Commission reconsider elements of its channel change **grant**. The failure of the Commission to address, either explicitly or meaningfully, Cox's requests for conditions on the WINK-DT authorization renders the decision arbitrary and capricious and contrary to agency precedent.

Respectfully submitted,

COX BROADCASTING, INC.

By:



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Dated: December 20, 2002

CERTIFICATE OF SERVICE

I, Sandra Brown, a secretary at the law ~~firm~~ of Dow, Lohnes & Albertson, PLLC do hereby certify that on this 20th day of December, 2002, the foregoing "PETITION FOR RECONSIDERATION OF COX BROADCASTING, INC." was served via first class mail (except where hand delivery is noted by an asterisk) to the following:

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